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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 314.

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

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INDEX.

	PAGE
OPINION BELOW	1
JURISDICTION	1–2
STATEMENT OF CASE	2–7
ARGUMENT	8
I—As the March Term, 1929 of the District Court of Delaware, during which term the judgment in plaintiff's favor was entered, had long since expired, the said District Court on June 30, 1930 was without jurisdiction to vacate and set aside its own judgment in plaintiff's favor entered May 11, 1929, and the Circuit Court of Appeals was clearly right in so doing	8–14
II—The pendency in the Circuit Court of Appeals of defendant's appeal from the judgment in plaintiff's favor, did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to grant petitioner's motion for a new trial and to vacate its own judgment after the expiration of the judgment term	14–23
III—The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause	23–24
CONCLUSION	24

within the purview of Rule 38(5) (b) of the Rules of this Court.

There is no basis for petitioner's contention (Brief, pp. 13-15) that Section 701 of the Revised Statutes (Title 28, Sec. 876, U. S. C. A.) sanctioned the order of remand which the Circuit Court of Appeals has itself since vacated. The provision that the appellate court "may direct such judgment or order to be rendered or such further proceedings to be had by the inferior court, as the justice of the case may require" is a power incidental to and dependent upon the exercise of the appellate power to "affirm, reverse or modify" judgments as therein provided.

This is clear from this Court's decision in *Ballew* v. *United States*, 160 U. S. 187, upon which petitioner relies (Brief, p. 14). There a judgment of conviction based upon a general verdict of guilty after trial of an indictment containing two counts, was *reversed* by this Court because of certain errors committed by the lower court. As the errors in question related solely to the crime charged by the first count of the indictment, this Court held that on reversing the general judgment for errors found in the record, it had power, under Section 701 R. S., to remand the cause with instructions to the lower court to enter judgment of conviction on the second count (as to which no error was found), and for such proceedings as to the first count as would be in conformity to law.

Thus the decision herein is clearly not in conflict with the *Ballew* case. Said case affords no basis for contending that under Section 701 R. S. a federal appellate court may remand a case to the court below and thereby confer upon the

lower court jurisdiction to vacate its own judgment and grant a new trial after the judgment term. If such power existed it would manifestly have been exercised by this Court *sua sponte* in such cases as *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298; *O'Connell* v. *United States*, 253 U. S. 142, 146 and *Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365 holding a Trial Court to be without power after the expiration of the term, at which final judgment was entered, to settle and sign a bill of exceptions, so essential to a review on the merits by a federal appellate court of final judgments in common law cases.

III.

The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause.

Petitioner contends (Petition, p. 6; Brief, pp. 17-20) that the Circuit Court of Appeals had power to authorize a new trial on the issue of the quantum of plaintiff's damages which, it is contended, presents a separable issue within the purview of this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494. Whether or not this is so is not material here, inasmuch as the question of the power of the Circuit Court of Appeals, upon reversal of judgment for errors committed below, to restrict the new

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Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R., 54-59) is officially reported in 51 Fed. 642-644.

Jurisdiction.

This case comes before this Court on writ of certiorari to the Circuit Court of Appeals for the Third Circuit which was granted by this court on October 19, 1931 (R.,

223) under the provisions of Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925, now Section 347-a of Title 28, United States Code Annotated.

Statement of Case.

On this writ petitioner (defendant below) seeks the reversal of two orders of the Circuit Court of Appeals entered herein on July 6, 1931. By one of said orders (R., 59), the Circuit Court of Appeals reversed an order of the District Court of Delaware (R., 48), entered June 30, 1930, whereby said District Court, at its June term, 1930, purported to set aside its own judgment, entered in favor of respondent (plaintiff below) on May 11, 1929 (R., 2) at the March term, 1929 of said court, and to grant petitioner's motion for a new trial "for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 48). For convenience we shall refer to the parties as they were below.

By the second of said orders (R., 212) the Circuit Court of Appeals, on plaintiff's motion, vacated its own *per curiam* order which it had previously entered at the request of the District Court (R., 45-46) on June 28, 1930, whereby it dismissed defendant's appeal "without prejudice" and had remanded the cause "to give the District Court a free hand" (R., 58) to grant a new trial.

The action, which was one at law to recover damages for defendant's breach of its written contract employing plaintiff as its President for a term of years, was tried by the Court without the intervention of a jury and resulted in a judgment in plaintiff's favor for $80,500. The District Court held that the contract was valid, that it had been breached by defendant's wrongful discharge of plaintiff and that plaintiff was entitled to damages at the rate of $25,000 per year in accordance with the terms of the contract for the three years covered by the breach,

less a sum of $4,500. in mitigation, which the Court held represented compensation to plaintiff for personal services rendered by him in connection with a joint speculative venture upon which he had embarked after his wrongful discharge (R., 203-4). The Court further held that plaintiff was entitled to the return of $10,000. which he had voluntarily left with defendant out of his first year's salary, to await payment of dividends on defendant's common stock, making plaintiff's total recovery $80,500. (R., 204-5) for which judgment was entered on May 11, 1929 at the March term, 1929 of said District Court.

Said judgment, which the District Court purported to set aside at its June term, 1930, was in all respects a final judgment and had been affirmed by the Circuit Court of Appeals on January 15, 1930 (R., 212; Docket Entries, 214). After affirmance, and prior to the issuance of the mandate, and while defendant's petition for rehearing was pending undetermined, the Circuit Court of Appeals, on defendant's petition (R., 3-11), granted defendant leave to apply to the District Court to have that court request the Circuit Court of Appeals to remand the cause so that the District Court could vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment. The order of the Circuit Court of Appeals provided that further proceedings in the cause in that Court be stayed until after the District Court had heard defendant's motion, and, if allowed, until it should have finally acted upon the matters raised thereby (R., 11-12).

Defendant thereupon filed its motion in the District Court for a new trial on alleged newly discovered evidence (R., 12-24). Plaintiff opposed the same on the merits (R., 24-43). On June 23, 1930 the District Court made an order (R. 44) requesting the Circuit Court of Appeals to dismiss defendant's appeal "without prejudice" and to remand the cause to the District Court

to the end that the District Court might vacate its own judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment. A certified copy of said request order was filed with the Clerk of the Circuit Court of Appeals on June 26, 1930 (Docket Entries, R., 215), and on June 28, 1930, on defendant's application, Circuit Judge Buffington, who was not a member of the court which had decided the appeal, signed a *per curiam* order dismissing defendant's appeal "without prejudice" (although said appeal had been determined and the judgment of the District Court affirmed) and remanding the cause as requested by the District Court (R., 45-46).

On June 30, 1930, the next court day following the granting of said *per curiam* order of remand, a certified copy of said order was filed in the District Court (R., 45), and on the same day defendant, over plaintiff's objection and exceptions (R., 46-49) obtained from the District Court an order (R. 48) vacating the District Court's own judgment in plaintiff's favor entered May 11, 1929 at the March term, 1929 of said District Court and granting defendant's motion for a new trial as to the quantum of the judgment (R., 48-49).

Thereafter plaintiff appealed from said order of the District Court which purported to vacate the judgment and grant a new trial, assigning as error that the District Court was without jurisdiction to vacate said judgment after the expiration of the judgment term (R., 50-52); and prior to the expiration of the March term, 1930, at which the Circuit Court of Appeals made its order of remand, plaintiff filed a petition, (R., 217-221) with leave of court (R., 221) requesting the Circuit Court of Appeals to vacate its *per curiam* order of remand and to release its mandate affirming the judgment in accordance with the order of affirmance theretofore entered in the cause on January 15, 1930. Plaintiff's motion and appeal

were argued simultaneously and resulted in the two orders of July 6, 1931 above mentioned, which are challenged by defendant on this writ.

The Circuit Court of Appeals, in entering the orders complained of, filed a reasoned opinion (R., 54-59) holding that the District Court of Delaware was without jurisdiction at its June term 1930 to vacate its own judgment in plaintiff's favor entered May 11, 1929 at the March term, 1929 of said court and to grant defendant's motion for a new trial upon newly discovered evidence, and further, that by its order of remand of June 28, 1930 the Circuit Court of Appeals was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" (R., 57). It, therefore, held that the order of the District Court vacating the judgment should be reversed and that its own order of remand should be vacated; it denied defendant's petition for a rehearing, which had been pending undetermined at the time of the entry of the order of remand, and directed the release of the mandate of affirmance in accordance with its order of affirmance of January 15, 1930 on defendant's appeal from the judgment (R., 58). The decision of the Circuit Court of Appeals herein reviewed was "without prejudice to defendant's right to seek relief by a bill of review in equity" (R., 59).

No question is raised by defendant as to the propriety of the rulings of the Circuit Court of Appeals on the first appeal, as to the validity of the contract and the measure of plaintiff's damages. The sole question raised on this writ involves the correctness of that court's ruling that the District Court was without jurisdiction to vacate its own judgment after the expiration of the judgment term and that its own order of remand did not vest in the District Court jurisdiction to grant defendant's motion for a new trial on newly discovered evidence after the expiration of the judgment term.

The inaccuracy in plaintiff's testimony, upon which defendant based its motion for a new trial had to do with the amount of plaintiff's capital contribution to a joint speculative venture upon which he had embarked with another after his wrongful discharge (R., 16, 21). Plaintiff testified on cross-examination that the arrangement provided for equal contributions of capital by himself and his co-adventurer (R., 144) and that out of the profits, if any were made, he was to receive preferential payment of $1,000. a month, the balance of the profits to be divided equally between them (R., 136, 143). The trial court held that as plaintiff was entitled to salary which required no capital investment and which was income of a non-speculative nature, the profits derived by plaintiff from said speculative venture which represented a return on his capital investment were not to be considered in mitigation of plaintiff's damages (R., 203-204) and excluded testimony as to the amount of such profits (R., 128, 130, 135, 166). The court held, however, that one-half of the sum of $9,000. which was paid to plaintiff out of profits in advance of an equal division of the balance of profits, arose not from plaintiff's speculation with his own capital, but from his services in managing the one-half interest of his co-adventurer, and hence was properly to be considered in mitigation as compensation for his services (R., 204). Plaintiff's testimony was inaccurate in that, under the arrangement, his capital contribution instead of being one-half, was one-fourth (R., 35). Defendant's application for a new trial was based upon this inaccuracy in plaintiff's testimony on the theory that plaintiff's damages should be further mitigated by an additional one-fourth of the distributive profits as representing payment for services rather than a return on plaintiff's capital.

Aside from the question of jurisdiction, as plaintiff contended below defendant's application does not come within the rule of "newly discovered evidence" as de-

fined by the authorities. While plaintiff himself testified that his capital contribution to the joint speculative account was one-half (R., 144), the record clearly shows that plaintiff was testifying as to recollection only. Thus, as to whether the capital of the joint venture was contributed in equal shares, he said "Without looking at the books, that would certainly be my impression." (R., 145.) Plaintiff further stated that he did not *think* that some of the stocks had been carried on the credit of his co-adventurer alone (R., 145), and that *as far as he recalled it,* the amount of his capital was at all times sufficient to take up one-half of the amount necessary for the operations (R., 144).

That plaintiff was not endeavoring to misstate the facts but was giving his best recollection as to the terms and operation of the joint speculative account, is shown not only by the above but by the fact that plaintiff himself volunteered the information that the arrangement "was all covered on a half sheet of typewriting" (R., 136). Thus, with notice that the arrangement was in writing and that plaintiff was testifying as to his recollection only, defendant deliberately chose to accept plaintiff's recollection and impressions rather than require the production of the agreement or the books. The case was being tried by the court without a jury and the contract and books could easily have been produced upon a brief adjournment. Moreover, one of defendant's officers who testified upon the trial (R., 180), admitted later that he "had always questioned Mr. Montgomery's testimony at some points concerning Palmer & Company", plaintiff's co-adventurer (R., 32), yet defendant did nothing with regard to investigating the amount of plaintiff's capital contribution during the time the case was pending before the District Court for decision on briefs, nor indeed until after the Circuit Court of Appeals had affirmed the judgment of the District Court in plaintiff's favor.

ARGUMENT.

POINT I.

As the March Term 1929 of the District Court of Delaware, during which term the judgment in plaintiff's favor was entered, had long since expired, the said District Court on June 30, 1930 was without jurisdiction to vacate and set aside its own judgment in plaintiff's favor entered May 11, 1929, and the Circuit Court of Appeals was clearly right in so holding.

It is a fundamental principle, thoroughly established by repeated decisions of this Court, that a federal court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless a proceeding for that purpose was begun during the term, or the term was for that purpose extended under general or special rule. (*Hudson* v. *Gustier*, 7 Cranch, 1; *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415-417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321; *United States* v. *Mayer*, 235 U. S. 55; *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70; *D. L. & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1; *United States* v. *Benz*, 282 U. S. 304, 306; *Baltimore S. S. Co.* v. *Phillips* (C. C. A. 2) 9 F. (2d) 932; *Greyerbiehl* v. *Hughes Electric Co.*, (C. C. A. 8) 294 Fed. 802; *United States* v. *Luvisch* (D. C.) 17 F. (2d) 200; *United States* v. *Gridley*, (D. C.) 49 F. (2d) 908; *Hart, et al* v. *Wiltsee*, (C. C. A. 1) 25 F. (2d) 863.)

The statutory provisions creating the various district courts of the United States and prescribing the terms thereof, are set forth in the United States Judicial Code. Section 75 of the Judicial Code (now Section 148 of Title 28, United States Codes Annotated), provides that

> "The State of Delaware shall constitute one judicial district, to be known as the district of Delaware. The terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September and December."

It is undisputed that the judgment in plaintiff's favor, which the order of the District Court purported to vacate and set aside, was dated May 1, 1929 and was entered in the District Court of Delaware on May 11, 1929, which was during the March Term, 1929 of said District Court. The judgment was one rendered in a civil suit at common law, and was in all respects a final judgment. The judgment was, of course, subject to review for errors of law committed by the trial court, but, as we have seen, upon consideration of defendant's appeal from said judgment (R., 208-210), the Circuit Court of Appeals found no error, and on January 15, 1930 affirmed the judgment "on the findings made by Judge Morris and on his reasoning in entering the verdict" (R., 212, 214). The subsequent order of June 28, 1930 dismissing defendant's appeal "without prejudice" in no way disturbed the judgment appealed from and remanded the cause to the District Court with the District Court's judgment unimpaired. When, therefore, the District Court made its order of June 30, 1930, from which plaintiff appealed, it purported to vacate and set aside its own judgment long after the judgment term had expired.

The foregoing authorities clearly establish that a federal District Court may not set aside or alter its own final judgment after the expiration of the term at which it was entered unless proceedings to that end are in-

CITATIONS.

	PAGE
Angle *v.* United States, (CCA 4) 162 Fed. 264	19
Ballew *v.* United States, 160 U. S. 187	1, 21, 22
Baltimore S. S. Co. *v.* Phillips (CCA 2) 9 F. (2d) 932 (reversed 274 U. S. 316)	8, 18
Bank of United States *v.* Moss, 6 How. 31, 38	8
Bronson *v.* Schulten, 104 U. S. 410	8, 10
Cameron *v.* M'Roberts, 3 Wheat. 591	8
Coleman *v.* United States, 26 F. (2d) 870	23
D. L. & W. R. R. Co. *v.* Rellstab, 276 U. S. 1	8, 13
Davis *v.* United States, (CCA 5) 47 F. (2d) 1071	19
Exporters *v.* Butterworth-Judson Co., 258 U. S. 365	22
Fairmont Creamery Co. *v.* Minnesota, 275 U. S. 70	8
Frankel *v.* Woodrough, 7 F. (2d) 796	14
Gasoline Products Co. *v.* Champlin Refining Co., 283 U. S. 494	23, 24
Greyerbiehl *v.* Hughes Electric Co., 294 Fed. 802 (CCA 8)	8
Hart, et al. *v.* Wiltsee, 25 F. (2d) 863	8
Hickman *v.* Fort Scott, 141 U. S. 415	8
Hudson *v.* Gustier, 7 Cranch, 1	8
Hughes, Federal Practice, Vol. VIII, p. 328	19
Hume *v.* Bowie, 148 U. S. 245, 255	8
Larrison *v.* United States, (CCA 7) 24 F. (2d) 82	19
Levinson *v.* United States, 32 F. (2d) 449	20
Marden *v.* Campbell P. & Mfg. Co. (CCA 1) 67 Fed. 809	18

PAGE

Martin *v.* United States (CCA 5) 17 F. (2d) 973 .. 19
In re Metropolitan Trust Co., 218 U. S. 312, 320, 321 8

O'Connell *v.* United States, 253 U. S. 142, 146 22

Perry *v.* United States (CCA 5) 139 F. (2d) 52 ... 19
Phillips *v.* Negley, 117 U. S. 665 ..... 8, 10

Roemer *v.* Simon, 91 U. S. 149 ..... 17, 18, 20
Russell *v.* Southard et al., 12 How. 139, 158 16

Scott *v.* United States (CCA 5) 165 Fed. 172 19
Sibbald *v.* United States, 12 Peters 488 ..... 8, 10
Silva *v.* United States (CCA 9) 38 F. (2d) 465... 20
Strand *v.* Griffith (CCA 9) 135 F. (2d) 739 17

Tubman *v.* B. & O. R. R. Co., 190 U. S. 38 8

United States *v.* Benz, 282 U. S. 304, 306 8
United States *v.* Gridley, et al., 49 F. (2d) 908 8
United States *v.* Luvisch (D. C.) 17 F. (2d) 200.. 8
United States *v.* Mayer, 235 U. S. 55. 8, 11, 14, 16, 19, 20, 21, 22

Vause *v.* United States (Unreported) 20

Wetmore *v.* Karrick, 205 U. S. 141, 149-152 8
Whitney *v.* Dick, 202 U. S. 132 14

STATUTES.

Act of March 3, 1891, Secs. 2, 6, 26 Stat. L. 826, 828 14
Section 75 Judicial Code (now Section 148 of Title 28, U. S. C. A.) 9
Section 701 Revised Statutes (Title 28, Sec. 876 U. S. C. A.) 21, 23

stituted before the term has expired. This court, in *Bronson* v. *Schulten*, supra, while holding that all judgments, decrees or other orders of the federal courts, however conclusive they may be, are under the control of the court during the term at which they are pronounced, said (p. 415):

> "it is a rule equally well established, that after the term has ended, all final judgments and decrees of the court pass beyond its control unless steps be taken during that Term, by motion or otherwise to set aside, modify or correct them * * * So strongly has this principle been upheld by this court that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court."

Similarly in *Sibbald* v. *United States*, 12 Pet. 488, one of the earlier cases of this court, considering the question of the jurisdiction of federal courts over their own judgments, it was held (p. 492):

> "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (3 Wheat. 591; 3 Peters, 431), or to reinstate a cause dismissed by mistake (12 Wheat., 10); from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error, *coram vobis*, at law, are exceptions which cannot affect the present motion."

In *Phillips* v. *Negley*, 117 U. S. 665, this Court reversed an order of the Supreme Court of the District of

Columbia which had set aside a default judgment after the expiration of the judgment term and had granted a new trial upon the ground of alleged "irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment". This Court said in part (p. 679):

> "We * * * are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief."

In *United States* v. *Mayer, supra,* 235 U. S. 55, which the Circuit Court of Appeals held rules the case at bar, a defendant, who after trial had been convicted in a criminal cause on five indictments for violations of the statutes relating to the use of the mails and for a conspiracy, moved in the District Court to set aside the judgments of conviction and for a new trial upon newly discovered evidence. The motion was made while his writ of error to review the judgments of conviction was pending in the Circuit Court of Appeals for the Second Circuit but after the expiration of the term of the District Court at which said judgments were rendered. The District Court of its own motion raised the question of its jurisdiction to entertain an application for a new trial in view of the expiry of the judgment term. The United States Attorney thereupon consented to a hearing of the application on the merits. The Court held that the defendant had not had a fair trial by an impartial jury because one of the jurors concealed a bias against the defendant on his examination on the *voir dire*, that neither defendant nor his counsel had knowledge of the facts upon which the motion for

a new trial was based until after the conclusion of the trial and after the expiration of the term, and that the facts could not have been discovered earlier by the exercise of reasonable diligence. The court granted the defendant a new trial, but withheld the entry of the order to permit the question of jurisdiction to be reviewed. Thereupon a writ of prohibition was applied for in the Circuit Court of Appeals for the Second Circuit and upon the return of the rule to show cause, the question of the jurisdiction of the District Court to vacate the judgments of conviction after the expiration of the judgment term was certified to this Court. The Chief Justice, then Mr. Justice Hughes, in speaking for a unanimous Court, held that as the judgment term of the District Court had expired, that court was without jurisdiction to vacate the judgments of conviction and to grant a new trial, saying (p. 67):

> "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term * * *."

This Court pointed out that, although a certain correctional jurisdiction remains in the District Court after the expiration of the term, such jurisdiction is of limited scope and does not embrace the power to grant a new trial on newly discovered evidence, saying (p. 69):

> "This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid. *In cases of* prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and *newly discovered evidence*, as well as where it is sought

> to have the court in which the case was tried reconsider its rulings, *the remedy is by a motion for a new trial* (Jud. Code, Sec. 269)—*an application which* is addressed to the sound discretion of the trial court, and, *in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.*" (Italics ours.)

The principle that a district court after the expiration of the judgment term lacks power to set aside the judgment and to grant a new trial was reaffirmed and reapplied by this court in the comparatively recent case of *D. L & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1. There the District Court of New Jersey, after its judgment had been affirmed by the Circuit Court of Appeals, and after the expiration of the judgment term, vacated its own judgment and granted a new trial upon the ground of perjured testimony. Mr. Justice Holmes, writing for a unanimous court, in holding the District Court to be without jurisdiction to vacate its judgment, said (p. 4):

> "However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. *The power of the Court to set aside its judgment on this ground ended with the term.*" (Italics ours.)

No claim is or could be made by defendant that the case at bar comes within any of the exceptions recognized by the foregoing authorities whereby a limited correctional jurisdiction is retained by the District Court, nor are we here concerned with the question as to whether defendant is entitled to relief by way of a bill of review in equity. The decision of the Circuit Court of Appeals,

here challenged, that the District Court lacked power to set aside its own judgment and to grant a new trial on newly discovered evidence after the expiration of the judgment term was in strict "accordance with the established principles which have been repeatedly set forth in the decisions of this court" holding that such an application "cannot be entertained in the absence of a different *statutory* rule after the expiration of the term at which the judgment was entered." *United States* v. *Mayer, supra,* at p. 69.

POINT II.

The pendency in the Circuit Court of Appeals of defendant's appeal from the judgment in plaintiff's favor, did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to grant petitioner's motion for a new trial and to vacate its own judgment after the expiration of the judgment term.

Defendant contends that because of the pendency of its appeal in the Circuit Court of Appeals, that court could properly remand the cause at the District Court's request so that the District Court could vacate its own judgment and grant a new trial upon newly discovered evidence although the judgment term had expired. Such contention, we submit, is unsound both on principle and authority. The Circuit Court of Appeals, like the District Court, is a court created by statute. It has no original jurisdiction, but only such jurisdiction as is conferred upon it which is exclusively appellate. (*Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer, supra; Frankel* v. *Woodrough,* 7 F. (3d) 796; Act of March 3, 1891, Secs. 2, 6, 26 Stat. L. 826, 828.)

The Circuit Court of Appeals concededly may not grant a motion for a new trial on newly discovered evi-

dence, and by its order of remand of June 28, 1930 did not purport to do so. Its sole authority is to exercise its appellate jurisdiction and to affirm, reverse or modify the judgment appealed from. Finding no error in the record herein, the Circuit Court of Appeals had affirmed plaintiff's judgment in its *per curiam* opinion of January 15, 1930. As Circuit Judge Woolley appropriately observed below (R., 73) this case "is not the ordinary case of a new trial awarded after a judgment has been reversed. Here the judgment has been affirmed and with the affirmance still in force a new trial was ordered."

The order of remand, therefore, was not an order or decree giving effect to a judgment of the Circuit Court of Appeals in the exercise of its appellate jurisdiction. On the contrary, it was an order entered at the request of the District Court—as the Circuit Court of Appeals itself expressed it: "To give the District Court a free hand"—and at most merely permitted the District Court to grant a new trial if it had jurisdiction to do so. The jurisdiction of the District Court being statutory, the order dismissing defendant's appeal without prejudice and remanding the cause did not revive the jurisdiction of the District Court which had expired with the judgment term, nor did it create a new or hybrid jurisdiction whereby said District Court after expiration of the judgment term could grant a motion for a new trial on newly discovered evidence. The District Court being without jurisdiction, the Circuit Court of Appeals was clearly right in making its second order, hereby complained of, which granted plaintiff's motion and vacated said *per curiam* order of remand.

The ruling of the Circuit Court of Appeals (R. 57) that it was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" is in conformity with the applicable decisions of this court.

Thus the decision of this Court in *United States* v. *Mayer, supra,* that in cases of newly discovered evidence the remedy is by motion for a new trial which cannot be entertained by the District Court, in the absence of a different *statutory* rule, after the expiration of the judgment term, was made in respect of a criminal case which was at that time pending on writ of error in the Circuit Court of Appeals for the Second Circuit. While leave to apply to the District Court for a new trial had not there been obtained from the Circuit Court of Appeals, this Court's ruling that the District Court was without jurisdiction to entertain the application, was based, not upon any such technical ground but upon the fundamental consideration of lack of power of the District Court to alter its own judgments after the expiration of the judgment term.

The decision in *United States* v. *Mayer,* involved the liberty of a defendant who had been sentenced to imprisonment as a result of what was held by the District Judge to have been an unfair trial, and if, in accordance with the contention of defendant herein, such a permissive order of remand could revive jurisdiction in the District Court or confer upon it a new or special jurisdiction to grant a new trial on newly discovered evidence after the judgment term, we believe this Court would have said so in its exhaustive opinion, inasmuch as the case was pending on appeal in the Circuit Court of Appeals.

In *Russell* v. *Southard, et al.,* 12 How. 139, 158, after the opinion of this Court was pronounced, a motion made on behalf of the appellees for a rehearing and to remand the cause to the Circuit Court "for further preparation and proof" on the ground of newly discovered evidence, was denied, Mr. Chief Justice Taney, in delivering the supplemental opinion of the Court, saying in part:

> "It is very clear that affidavits of newly discovered evidence cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record."

Similarly, in *Roemer* v. *Simon*, 91 U. S. 149, an equity case, while the case was pending on appeal before this Court, appellant, on motion, requested this Court to set aside the final decree of the Circuit Court and grant a rehearing on newly discovered evidence. This Court denied appellant's motion, holding that its sole power was to "affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause." Mr. Chief Justice Waite, in writing for a unanimous court, set forth the proper practice for such a rehearing, *in cases where the term of the trial court has not expired*, but held that inasmuch as the term of the Circuit Court in that case had expired, the case could not be remanded by this Court for rehearing, saying:

> "It is clear that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here (Rev. Stat. sec. 698). The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule 88. *It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed.*" (Italics ours.)

The decree was later affirmed by this Court on the original record in 95 U. S. 214.

The decisions of the Circuit Courts of Appeals are of similar import. In *Strand* v. *Griffith*, 135 Fed. 739, the Circuit Court of Appeals, Ninth Circuit, denied appellant's motion for leave to dismiss the appeal and to remand the cause to the lower court with directions to said court to allow the requested amendments to the bill of complaint to be made. The Court held on the authority of *Roemer* v. *Simon, supra*, that it was without power to grant the relief requested, the term of the court below having expired.

Similarly in *Marden* v. *Campbell P. & Mfg. Co.*, 67 Fed. 809, the Circuit Court of Appeals for the First Circuit held that the only power which a Circuit Court of Appeals has with respect to remanding a cause, is to give effect to a judgment of its own and that it cannot remand for the purpose of allowing the defeated party to have a rehearing in the trial court upon new matter. The Court said (p. 811):

> "The defendants in the court below have filed two motions in this court, which we have considered. The first is that the cause be remanded to the circuit court 'for the purpose of a rehearing of the said cause,' having reference undoubtedly to the new matter presented to the circuit court, to which we have referred. *This court, however, has no power to remand except for the purpose of giving effect to some judgment of its own. Roemer* v. *Simon*, 91 U. S. 149; *Smith* v. *Weeks*, 3 C. C. A. 644, 53 Fed. 758. This is so essential by fundamental rules of practice that it need only be stated. *To remand under any other circumstances would necessarily operate as a dismissal.*" (Italics ours.)

As the decree there appealed from was interlocutory, the Court permitted appellants to dismiss their appeal without prejudice to further proceedings in the Circuit Court, which then clearly had jurisdiction of the cause.

In *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902 (reversed on other grounds 274 U. S. 316), the Circuit Court of Appeals for the Second Circuit upheld the right of the District Court to vacate a prior judgment from which an appeal had been taken, where the term of the District Court had not expired and the cause had been remanded by the Circuit Court of Appeals at the request of the District Court for its further consideration. Referring to this Court's decision in *Roemer* v. *Simon, supra*, the Circuit Court of Appeals said (p. 903):

> "The decree appealed from was final and the term had expired, for which reason the court denied the motion, *as the Circuit Court could have*

> *done nothing in the cause after remittitur.* But they laid down the proper practice, if the term had been open, which is for the appellant to apply to the lower court to reopen the decree, and for that court to request the upper court to remit." (Italics ours).

In *Hughes' Federal Practice* (1931, Vol. VIII, Sec. 5901, p. 328) the rule is stated as follows:

> "No new evidence can be received in the appellate court, and the District Court cannot grant a rehearing after the term at which the final decree was rendered. * * * Therefore, a Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant, and remand the case to the court below with directions to permit the amendment of a pleading, on a showing that facts were inadvertently omitted therefrom which were not known to the appellant until after the appeal was taken."

In *Angle* v. *United States,* 162 Fed. 264; *Davis* v. *United States,* 47 F. (2d) 1071; *Perry* v. *United States,* 39 F. (2d) 52, *Larrison* v. *United States,* 24 F. (2d) 82, and *Martin* v. *United States,* 17 F. (2d) 973 relied upon by defendant, the question of the jurisdiction of the trial court does not appear to have been mooted. In all of them the applications were denied on the merits and the courts' assumption that jurisdiction existed appears to have gone unchallenged. In *Scott* v. *United States,* 165 Fed. 172, the court in authorizing the trial court to modify its sentence in a criminal cause, based its action upon the consent of the Government. Whether or not the quotations from the opinions relied upon by defendant can be regarded as more than *dicta,* it is clear, we submit, that they are in conflict with the decisions of this Court and with "the established rule" which "embodies the policy of the law that litigation be finally terminated." *United States* v. *Mayer, supra,* p. 70. Moreover, five of the cases cite the *Angle* case as authority for the views upon which

court. As the errors in question related solely to the crime charged by the first count of the indictment, this court held that on reversing the general judgment for errors found in the record, it had power under Section 701 R. S. to remand the cause with instructions to the lower court to enter judgment of conviction on the second count, as to which no error was found, and to take such proceedings as to the first count as would be in conformity to law. Thus the decision in the *Ballew* case is not in conflict with the decision of the Circuit Court of Appeals herein, and affords no basis for contending that under Section 701 R. S. Circuit Courts of Appeals may remand a case to the trial court and thereby confer upon it jurisdiction to vacate its own judgment and grant a new trial after the judgment term.

If, as defendant contends, such power exists under Section 701 R. S., it would have been so held by this court in *United States* v. *Mayer, supra,* and also in such cases as *O'Connell* v. *United States,* 253 U. S. 142, 147, *Exporters* v. *Butterworth-Judson Co.,* 258 U. S. 365, and similar cases holding the trial court to be without power, after the expiration of the term at which final judgment is entered, to settle bills of exceptions, so essential to a review on the merits of final judgments in common law cases.

In *Exporters* v. *Butterworth-Judson Co., supra,* Mr. Justice McReynolds, in holding that consent of the parties to the settlement of a bill of exceptions after the expiration of the judgment term was wholly ineffectual, said (p. 369):

> "Consent of the parties cannot give jurisdiction to courts of the United States * * * The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties."

In *Coleman* v. *United States*, 26 F. (2d) 870, the Circuit Court of Appeals for the Eighth Circuit denied the Government's motion in a criminal case to correct an alleged error in the testimony as set forth in the bill of exceptions as settled. The court pointed out that the District Court's term had expired before the motion was filed and denied the motion, saying (p. 871):

> "This court being without power to settle a bill of exceptions originally or by amendment, and the time within which the trial court had jurisdiction so to do having expired before this motion was filed, the motion must be and it is denied."

These decisions and many decisions of similar import were all pronounced in cases pending on appeal, yet we find no suggestion that the statutory void could be bridged by a remand under Section 701 R. S.

POINT III.

The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause.

Defendant contends that the Circuit Court of Appeals had power to authorize a new trial on the issue of the quantum of plaintiff's damages which, it is contended, presents a separable issue within the purview of this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494. Whether or not this is so

is not material here, inasmuch as the question of the power of the Circuit Court of Appeals, upon reversal of judgment for errors committed below, to restrict the new trial to a separable issue is in no wise involved herein. The Circuit Court of Appeals did not grant a new trial; it did not disturb the District Court's judgment. It had found no error and affirmed the judgment in a *per curiam* opinion and by its order of affirmance entered January 15, 1930. Furthermore, as shown by the court's opinion (R., 75) it has adhered to its views on the law of the case by denying, simultaneously with its decision herein, the petition for rehearing which had been filed by defendant and which had remained undecided when its order of remand was made. The case of *Gasoline Products Co.* v. *Champlin Refining Co.* is not apposite here, inasmuch as the question of the scope of a retrial is pertinent only where, in the exercise of its appellate jurisdiction, a new trial has been ordered by the appellate court for errors appearing in the record.

CONCLUSION.

It is respectfully submitted that the orders of the Circuit Court of Appeals of July 6, 1931 should be in all respects affirmed.

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